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IN THE

Supreme Court of the United States

October Term, 1967

No. 831

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE, *et al.*,

Appellants,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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November 17, 1967

INDEX

	PAGE
Opinions Below	2
Jurisdiction	3
Questions Presented	4
Statutes Involved	5
Statement	5
The Questions Presented Are Substantial	12
I. The District Court erred in failing to enjoin consummation of the Penn-Central merger prior to a determination that inclusion of the New Haven in the Penn-Central System is feasible, especially in view of its recognition that inclusion of the New Haven in the Penn-Central System is uncertain and might never occur	13
II. The District Court erred in failing to enjoin consummation of the Penn-Central merger without simultaneous assumption by the Penn-Central System of the New Haven Railroad operations	21
III. The District Court erred in concluding that there should be immediate consummation of the Penn-Central merger despite its finding that essential conditions for interim support for the New Haven were still pending before the Commission and were incomplete	23

PAGE

IV. The District Court erred in concluding that the Penn-Central merger may lawfully be consummated without the Commission having provided conditions to protect the freight traffic of the New Haven from diversion to the Penn-Central System until such time as the New Haven was included in the Penn-Central System or ceased to operate as a railroad 27

CONCLUSION 29

Table of Authorities

CASES:

Baltimore & Ohio R. Co. v. *United States*, 386, U.S. 372 (1967) 14, 16, 17, 18, 20, 27, 29

Bankers Trust Co. v. *Gebhart*, 195 F. 2d 238 (2d Cir. 1952) 24

Chase Manhattan Bank v. *Smith*, 378 F. 2d 635 (2d. Cir. 1967) 12

Chicago Junction Case, 264 U.S. 258 (1924) 27

In re Third Ave. Transit Corp., 198 F. 2d 703 (2d Cir. 1952) 16, 24

Louisville Joint Stock Bank v. *Radford*, 295 U.S. 555 (1935) 16

McLean Trucking Co v. *United States*, 321 U.S. 67 (1944) 27

N & W-Nickel Plate Merger, 324 I.C.C. 1 (1964)... 14

Railroad Commission of Texas v. *Eastern Texas* Railroad, 264 U.S. 79 (1924) 16, 22

St. Joe Paper Co. v. *Atlantic Coast Line*, 347 U.S. 298 (1954) 15, 18

PAGE

STATUTES:

ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C.:

Section 702 ..... 5, B-1
Section 704 ..... 5, B-1
Section 706 ..... 5, B-1

JUDICIAL CODE, 28 U.S.C.:

Section 1253 ..... 3, 5, B-2
Section 1336 ..... 3, 5,B-3
Section 2101 (b) 5, B-3
Section 2284 ..... 3, 5, B-3
Section 2321-25 ..... 3, 5, B-5

INTERSTATE COMMERCE ACT, 49 U.S.C.:

Section 5(2) 4, 5, 6, 27, 29, B-7
Section 5(9) 5, B-10

BANKRUPTCY ACT, 11 U.S.C.:

Section 205(b) 5, 11, 15, 16, B-10
Section 205(d) 5, B-13
Section 205 (e) 5, B-14
Section 205 (f) 5, B-19
Section 205 (g) 5, B-21

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JURISDICTIONAL STATEMENT

The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee (Committee) appeals from the judgment of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing appellant's complaint seeking to enjoin the enforcement of an order of the Interstate Commerce Commission, dated June 9, 1967, which permitted immediate consummation of the Penn-Central merger, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

On November 3, 1966, the Committee filed with Mr. Justice Harlan an application for a stay of consummation

of the merger. By Interim Memorandum dated November 6, 1967, Mr. Justice Harlan referred the stay application and similar applications of other parties to this appeal and related appeals to the full Court. To avoid unnecessary repetition we refer herein to various portions of the stay application.

On November 9, 1967, this Court stayed enforcement of the Commission order, consolidated all appeals from the October 19, 1967 order below, and established an expedited schedule to hear all appeals.

Opinions Below

The three-judge United States District Court for the Southern District of New York issued its opinion in this case and related cases on October 19, 1967. The opinion is not yet reported. The opinion has been reprinted as Appendix B to the jurisdictional statement heretofore filed on behalf of Baltimore and Ohio Railroad Company, et al. in related appeal No. 778. Reference is hereby made to said appendix for said opinion.*

The report and order of the Interstate Commerce Commission, dated June 9, 1967, are reported at 330 I.C.C. 328. The Commission's two previous reports and orders, dated April 6, 1966 and September 16, 1966, are reported at 327 I.C.C. 475 and 328 I.C.C. 304, respectively.

The Commission's orders dated August 1, 1967 and September 12, 1967 in the consolidated Penn-Central merger and New Haven reorganization dockets are attached as Appendix 1 and Appendix 2, respectively, to the stay application filed in this Court on behalf of Baltimore and Ohio Railroad Company on November 2, 1967.

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* Reference to pages of said opinion herein will be identified by reference to "B&O, J.S., B- ".

Reference is hereby made to said appendix for said orders.

The Commission's order dated October 5, 1967 in the consolidated Penn-Central merger and New Haven reorganization dockets is reprinted here as Appendix A.

Jurisdiction

The action below was instituted by Oscar Gruss & Son on October 18, 1966 to enjoin the aforesaid Commission order of April 6, 1966. On November 3, 1966, the Committee's motion to intervene as a plaintiff and file its complaint was granted by District Judge Levet. On November 28, 1967, the District Court granted summary judgment dismissing the complaints. See 261 F. Supp. 386 (S.D.N.Y. 1966). On May 8, 1967, this Court vacated the order of dismissal and remanded the case to the District Court. Supplemental complaints were filed in accordance with an order of the District Court dated June 21, 1967.

This action was brought under Title 28, U.S.C. §§ 1336, 2284 and 2321-25, to annul and set aside an order of the Interstate Commerce Commission dated June 9, 1967, and to obtain injunctive relief. The order of the District Court dismissing the complaint "without prejudice to any action plaintiffs may be advised to take with respect to any further order in F.D. No. 21989 relating to temporary assistance to the New Haven or the inclusion of the New Haven in Pennsylvania-Central", was entered on October 19, 1967. Notice of appeal was filed in that court by the Committee on November 1, 1967. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by Title 28, U.S.C. §§ 1253 and 2101 (b).

Questions Presented

The Commission has ordered consummation of the Penn-Central merger, while reserving jurisdiction to determine the following issues, all of which remain pending and undecided at this time:

(a) The feasibility of inclusion of the New Haven and fair and equitable terms and conditions for such inclusion;

(b) A plan of reorganization for the New Haven based upon fair and equitable terms of inclusion;

(c) Just, reasonable and equitable terms of a lease or loan or other appropriate arrangement to assure protection for and continuation of the New Haven's operations until the New Haven was actually included in the Penn-Central system or ceased to operate;

(d) Financial indemnity conditions for traffic diversion losses suffered by the New Haven as a result of the Penn-Central merger.

Under the circumstances, the following questions are presented:

1. Has the Commission violated Section 5(2) of the Interstate Commerce Act in permitting consummation of the Penn-Central merger prior to determination that inclusion of the New Haven in the Penn-Central system is feasible and prior to the formulation of fair and equitable terms of inclusion consistent with the public interest?

2. Has the Commission violated Section 5(2) of the Interstate Commerce Act in permitting consummation of the Penn-Central merger without simultaneous assumption by the Penn-Central system of New Haven's operations?

3. Has the District Court erred in concluding that there should be immediate consummation of the Penn-Central merger despite its finding that essential conditions for interim support of New Haven operations are still pending before the Commission and are incomplete?

4. Has the Commission violated Section 5(2) of the Interstate Commerce Act and the District Court erred in concluding that the Penn-Central merger may lawfully be consummated without providing conditions to protect the freight traffic of the New Haven from diversion to the Penn-Central system until such time as the New Haven was included in the Penn-Central system or ceased to operate as a railroad?

5. Under all the circumstances, has the District Court erred in failing to enjoin consummation of the Penn-Central merger?

Statutes Involved

The statutes involved in this case are: Administrative Procedure Act, §§ 10(a), 10(c), 10(e); 5 U.S.C. §§ 702, 704, 706; Judicial Code, 28 U.S.C. §§ 1253, 1336, 2101 (b), 2284, 2321-25; Interstate Commerce Act, §§ 5(2), 5(9), 49 U.S.C. §§ 5(2), 5(9); Bankruptcy Act §§ 77(b), 77(d), 77(e), 77(f), 77(g); 11 U.S.C. §§ 205(b), 205(d), 205(e), 205(f), 205(g). The text of these statutes is attached hereto as Appendix B.

Statement

The New Haven Railroad is and has been a Debtor in reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the District of Connecticut, since July 7, 1961. The Committee has been authorized to represent holders of the New Haven's First and Refunding Mortgage Bonds in the reorganization proceedings since February 5, 1962.

On June 25, 1962, the New Haven Trustees filed a petition with the Commission under Section 5(2)(d) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(d), for inclusion of the New Haven's transportation system in the Penn-Central system proposed by the Penn and Central joint application for merger dated March 9, 1962.

During 1964, the New Haven Trustees commenced negotiations with Penn and Central for a sale of the New Haven assets to the merged Penn-Central. An agreement in principle was reached in December 1964 but it was not immediately announced. On March 22, 1965, the Commission Hearing Examiners issued their report in the Penn-Central merger. On March 31, 1965, the New Haven Trustees announced that they had entered into a memorandum of agreement with Penn and Central and that a more definite agreement would follow. The agreement contemplated operation by Penn-Central of New Haven's freight service only. The Commission's order of April 6, 1966 approving the Penn-Central merger contained the following condition with respect to the New Haven:

> "8. The Pennsylvania New York Central Transportation Company shall be required to include in the transaction all the New York, New Haven and Hartford Railroad Company—the inclusion of passenger operations being subject to the findings and determinations of the Commission as set forth in Finance

> Docket No. 23831 issued simultaneously with this report—upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission. Within 6 months after the date this report is served, the parties shall file with the Commission for its approval, a plan for such inclusion. In the event the parties are unable to reach an agreement (and subject to approval by the Bankruptcy Court) such inclusion shall be upon such fair and equitable terms and conditions as the Commission may impose."
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> • • •
>
> "Jurisdiction is hereby reserved for such purposes. Consummation of the merger by applicants shall indicate their full and complete assent to these requirements." (327 I.C.C. at p. 553)

The passenger discontinuance case referred to above was reported at 327 I.C.C. 151 (1966). That report and order stated:

> "Furthermore, in approving the Penn-Central merger concurrently herewith, the Commission, as *an essential precondition to consummation of the merger,* has required the inclusion of the New Haven into Penn-Central—that is, inclusion of the New Haven's freight and passenger operations." (327 I.C.C. at p. 173) (emphasis added)

The Commission has found that the New Haven cannot withstand competition from a merged Penn-Central system. The Commission stated in its April 6, 1966 report:

> "The Transportation Company, with new routings and improved service, could undoubtedly wean substantial traffic away from NH and leave that already moribund carrier in perhaps an irretrievable situation." (327 I.C.C. at p. 522)

This finding has been uncontroverted throughout the merger proceedings. It is an inevitable conclusion from the fact that the relationship between the New Haven and Penn has been close for many years. Indeed, Penn is the New Haven's single most important connection. This close traf-

fic relationship between Penn and the New Haven has been used by Penn for the purpose of competing with Central for freight traffic to and from points served in common by the Central and New Haven. When Penn and Central are merged, the Penn-Central will have no incentive to use New Haven's facilities and the Penn feed will be lost to the New Haven. The immediate harm to the New Haven is obvious.

The Commission, in its April 6, 1966 report, adopted the findings of the Hearing Examiners (327 I.C.C. at p. 481), one of which states as follows:

> ". . . the proposed merger, in our opinion, would effectively destroy its [NH] ability to survive, for the loss of its existing relationship with P.R.R., and the latter's conversion to an effective competitor would of itself isolate N.H. and destroy any possibility of recovery." (Hearing Examiners' Report, Mar. 22, 1965, p. 345)

Because of the anticipated destructive impact of Penn-Central upon New Haven, the Commission, in its initial approval of the Penn-Central merger, not only found that inclusion of the New Haven in the Penn-Central system is consistent with the public interest (327 I.C.C. at pp. 526-7), but it made the following finding:

> "In this context, and in light of and subject to the order in the section 13a proceeding which is being served simultaneously with this report, *we find that this merger, without complete inclusion of the NH, would not be consistent with the public interest,* and, accordingly, we will require all the New Haven railroad to be included in the applicants' transaction." (327 I.C.C. at p. 524) (emphasis added)

No Appendix G protective conditions were provided for the New Haven by the Commission in the April 6, 1966 report, or any subsequent report. In November, 1966, the Committee pointed out this failure to the District Court, but

the Commission has not thus far made any provision for such protection.

On April 21, 1966, the New Haven Trustees and Penn and Central executed a detailed agreement for the sale of New Haven. The agreement was not, and never has been, submitted to the Reorganization Court for approval. The agreement required the New Haven Trustees to take no position in opposition to the Penn-Central merger and obligated the New Haven Trustees "to use their best efforts, as trustees, to effect consummation of the transactions contemplated hereby." (Gruss, Stay Application, Appendix B). As a result, the New Haven Trustees have considered themselves estopped from seeking inclusion of the New Haven simultaneously with the Penn-Central merger.*

On October 27, 1966, Penn and Central filed a plan for inclusion of the New Haven with the Commission and the New Haven Trustees filed a partial plan of reorganization with the Commission. Both the plan for inclusion and the partial plan of reorganization were based upon the April 21, 1966 agreement to sell the New Haven to Penn-Central.

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* The opinion below stated: ". . . we recognized that matters would appear differently if the reorganization court found that the New Haven Trustees, even though acting in the best of faith had disabled themselves from properly representing the estate on a certain issue, . . . Judge Anderson's order of July 11, 1967, did something along these lines; . . ." (B & O, J.S., B-27). Judge Anderson's July 11, 1967 order stated: "The Trustees and the Pennsylvania and New York Central Railroads entered into the contract in good faith, and the Trustees have quite properly felt under a duty to continue their support of the agreement thus entered into and avoid any action which would be or appear to be a repudiation of its letter or spirit. Therefore, while the Trustees should not oppose the immediate inclusion request by other parties in interest, the court is extremely reluctant to order the Trustees to make such a request without their first being given an opportunity to negotiate with the Pennsylvania and New York Central about necessary amendments to the contract to adapt it to immediate inclusion."

The Commission held hearings on the inclusion and reorganization, on 37 days during the period January 12, 1967 through May 12, 1967, in the Penn-Central merger docket (No. 21989) and the New Haven reorganization docket (No. 21669). Oral argument was held before the full Commission on June 15, 1967 and final briefs were filed on July 17, 1967. The Commission has issued no report to date.

On July 11, 1967, Circuit Judge Robert P. Anderson, (sitting by designation) in the New Haven reorganization proceedings in the United States District Court for the District of Connecticut, issued a "Partial Ruling" on the New Haven Trustees' petition in that court for order No. 441 and the cross-petition of the Committee.* (The Partial Ruling is reprinted in Gruss, Stay Application, Appendix A)

The "Partial Ruling" stated in part:

> "The court is therefore of the opinion that the Interstate Commerce Commission should be asked to order inclusion as soon as the merger takes place."

Following Judge Anderson's July 11, 1967 partial ruling, the States of New York, Massachusetts, Rhode Island and Connecticut and the New Haven bondholder representatives,** requested the Commission to order Penn-Cen-

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* The Trustees petition for order 441 is for instructions as to whether to continue to operate the railroad, and the Committee's cross-petition is for a dismissal of the reorganization proceedings. The petition and cross-petition are reprinted as Appendix A and B to brief submitted below by the Trustees (Record in No. 778, pp. 1944-2069). The petition and cross-petition are still pending.

** The bondholder representatives contemplated that the lease would provide that all operations of the New Haven would be at the risk and for the account of Penn-Central. This was thought to be the equivalent of simultaneous inclusion while permitting the necessary reorganization proceedings to be completed. The Trustees' sales agreement with Penn-Central indicates that it had been expected that the New Haven operations would be included by January 1, 1968.

tral to take over New Haven's railroad operations by lease, immediately upon consummation of the Penn-Central merger. The Commission responded by an order dated August 1, 1967 (served August 3, 1967), issued in both the Penn-Central merger docket and the New Haven reorganization docket, which modified its April 6, 1966 and June 9, 1967 orders, to direct the New Haven Trustees and Penn and Central to file, subject to the Bankruptcy Act, within 30 days, proposed terms of a lease to enable Penn-Central to operate the New Haven during a period from consummation of the Penn-Central merger until the actual inclusion of the New Haven. The order establishes as a condition, that consummation of the Penn-Central merger would constitute Penn-Central's irrevocable assent to operation of the New Haven "under such just, reasonable and equitable lease terms as the Commission may require". (B&O Stay Application, Appendix 1.)

On September 1, 1967, Penn and Central and the New Haven Trustees filed separate proposals allegedly in response to the Commission's order served August 3, 1967. However, neither proposal provided for an interim operating lease as required by the Commission order. Essentially, the Penn-Central proposal provides that Penn-Central will lend the New Haven up to $25 million over a three-year period upon the issuance of Trustees' Certificates having a priority lien status. The New Haven Trustees' proposal also provides for a loan from Penn-Central of up to $25 million upon the issuance of Trustees' Certificates and further provides for a formula arrangement whereby Penn-Central could share, with the creditors and the states, in any interim operating deficits of the New Haven. The Trustees' proposal contemplates that the amount of the operating losses to be borne by Penn-Central be added to the purchase price to be paid by Penn-Central to New Haven if and when inclusion of the New Haven takes place. (The New Haven Trustees' proposal is reprinted as Appendix D to brief submitted below by the

Trustees. Record in No. 778, pp. 1944-2069. The Penn-Central proposal was submitted below as Exhibit A to affidavit of James B. Gray dated September 14, 1967. Record in No. 778, pp. 2086-2138.)

On September 12, 1967, the Commission issued a further order amending its August 1, 1967 order and providing that consummation of the Penn-Central merger would constitute irrevocable assent, subject to judicial review, to an "appropriate arrangement" for protection and interim support of New Haven operations. (B&O Stay Application, Appendix 2.) Hearings on this condition were held by the Commission on September 25, 26 and 27, 1967. Oral argument was held before the full Commission on October 2, 1967 and final briefs were filed on October 12, 1967. The Commission has issued no report to date.

As a result of the decision in the case of *Chase Manhattan Bank, et al.* v. *Smith,* 378 F. 2d 635 (2d Cir. 1967), the New Haven Trustees filed a "conventional" plan of reorganization based upon sale of the New Haven to Penn-Central, with the Commission, on September 1, 1967. (The Trustees' plan is reprinted as Appendix E to brief submitted below by the Trustees. Record in No. 778, pp. 1944-2069.) By order dated October 5, 1967, the Commission has set November 29, 1967 for hearings to commence on the proposed plan of reorganization.

The Questions Presented Are Substantial

The questions presented by this appeal are substantial and require plenary consideration for their resolution. They arise out of the determination by the Commission to ignore the immediate destructive impact of the various Commission orders on the New Haven and its first mortgage bondholders. Consideration of every element of aid or protection to which the New Haven is entitled has been "put aside" by the Commission because of its assumption

that some day, in some manner, the New Haven will be included in the merged Penn-Central system, and at that indefinite future time, the damage caused may be rectified.

The Commission has not even determined if inclusion of the New Haven is feasible, or if fair and equitable terms of inclusion consistent with the public interest can be formulated, although it has recognized that inclusion, even if feasible, will be considerably delayed. Despite those facts, the Commission has relied upon the possibility of inclusion to prevent the New Haven from discontinuing its deficit passenger operations, 327 I.C.C. 151 (1966); to deny the New Haven interim traffic protective conditions; and to delay determination of a time of take over of the New Haven operations and the termination of the shouldering of the continuing New Haven operating losses by the New Haven mortgage bondholders. These questions are discussed below.

I

The District Court erred in failing to enjoin consummation of the Penn-Central merger prior to a determination that inclusion of the New Haven in the Penn-Central System is feasible, especially in view of its recognition that inclusion of the New Haven in the Penn-Central System is uncertain and might never occur.

The Commission has made clear and uncontroverted findings that the Penn-Central merger would have the effect of destroying the freight operations of the New Haven. 327 I.C.C. at page 522 (1966); Hearing Examiners' Report, page 345 (Mar. 22, 1965). Despite these findings, the Commission has failed to provide interim protective conditions equivalent to Appendix G, for the New Haven. Although the Commission made no finding on the issue, its failure to provide protective conditions apparently resulted from an

impression that it was providing the New Haven with something *more* than protective conditions by requiring Penn-Central to include the New Haven. When the Penn-Central merger was previously before this Court in *Baltimore & Ohio R. Co.* v. *United States,* 386 U.S. 372 (1967), the facts indicated that the three railroads involved, E-L, D&H and B&M, probably could not withstand competition from a merged Penn-Central system and were awaiting determinations of terms of inclusion in the N&W system, pursuant to a condition fixed in the *N&W-Nickel Plate Merger,* 324 I.C.C. 1 (1964). This Court stated:

> "The sole question before us is whether, in light of the finding as to the necessity for interim protection for the so-called protected railroads, the Commission erred in permitting the consummation of the merger prior to and without awaiting determination of the inclusion proceedings. *We believe that the Commission erred in approving the immediate consummation of the merger without determining the ultimate fate of the protected roads.*" (386 U.S. at p. 378) (emphasis added)

At this time, E-L, D&H and B&M have Appendix G protective conditions and the terms and conditions of their inclusion in the N&W system have been determined by the Commission and upheld by the District Court. The New Haven, however, has no Appendix G protective conditions and the terms of its inclusion in the Penn-Central system have not yet been determined by the Commission. The New Haven's "ultimate fate" has not been determined.

The Commission itself has recognized that basic issues regarding the New Haven inclusion remain to be decided. In its April 6, 1966 report, it stated:

> "The inclusions contemplated by section 5(2)(c) and (d) require a careful weighing of all relevant factors to insure that, if inclusion is to be a condition of approval, it will be feasible, equitable, just and reasonable." (327 I.C.C. at p. 524)

In its September 16, 1966 report, the Commission stated:

> "We indicated in the prior report our awareness of the necessity for satisfying the procedural requirements of Section 77 of the Bankruptcy Act. Speculation as to whether and how the individual statutory requirements apply to the inclusion would have been pointless at that time and is equally pointless now." (328 I.C.C. at p. 319)

Although hearings before the Commission on the terms of a New Haven inclusion have been closed and briefs filed, the Commission has not completed its "careful weighing of all relevant factors" or determined a plan of inclusion found by it to be "feasible, equitable, just and reasonable." It cannot do so until a plan of reorganization pursuant to Section 77 of the Bankruptcy Act based upon inclusion of the New Haven has been heard and determined.

Judge Friendly, in his opinion below, recognized that "the day of such inclusion is at best some time off" (B&O J.S., B-23). He outlined the procedural requirements for inclusion by sale of New Haven assets, and described them as "sources of uncertainty and delay" (B&O J.S., B-24). In fact, Judge Friendly noted that inclusion might be prevented unless this Court reverses its previous position in the case of *St. Joe Paper Co.* v. *Atlantic Coast Line*, 347 U.S. 298 (1954) or Congress passes new legislation (B&O J.S., B-24). Obviously, inclusion of the New Haven is far from certain.

In addition, because of New Haven's deficit operations but valuable real estate interests, serious uncertainties exist as to whether the Commission will be able to fix terms equitable to both Penn-Central and the New Haven creditors and find that inclusion is feasible. There is no question that the New Haven's overall operations are now deficit operations. The proof and arguments presented in the New Haven inclusion proceedings reveal that the value of the New Haven that could be obtained on liquidation of

the assets is more than one hundred million dollars greater than the value that Penn-Central states that it is willing to pay for the New Haven as an operating railroad. The difficult problems involved, although unresolved at this time, cannot be ignored. As the Commission noted in its April 6, 1966 report, Penn-Central itself has contended that:

> "To arrive at equitable terms as to either NH's creditors or the burden that can properly be placed on the Transportation Company's system, would be extremely difficult . . ." (327 I.C.C. at p. 523).

It is entirely possible that the Commission will not require Penn-Central to pay the equivalent of the liquidation value of the New Haven. If that is the case, when an approved plan of reorganization is forwarded from the Commission to the Reorganization Court in accordance with Section 77 of the Bankruptcy Act, it can be expected that the Reorganization Court will recognize that a sale of the New Haven for less than its liquidation value would effect an unconstitutional taking of property. *Railroad Commission of Texas* v. *Eastern Texas Railroad*, 264 U.S. 79, 85 (1924); *Louisville Joint Stock Bank* v. *Radford*, 295 U.S. 555, 602 (1935); *In re Third Ave. Transit Corp.*, 198 F. 2d 703, 707 (2nd Cir. 1952). The Reorganization Court might then send the plan back to the Commission, or might dismiss the reorganization proceedings. These procedures may take months to complete. In the meantime, the New Haven's losses will have dramatically increased because of diversion resulting from the impact of the Penn-Central merger and, if there is no inclusion, those losses will not be recovered.

It is apparent that the problems facing inclusion of the New Haven are much greater than those facing E-L, D&H and B&M when this Court decided the *Baltimore & Ohio R. Co.* v. *United States* case. In his concurring opinion in that case, Mr. Justice Brennan virtually anticipated the New Haven situation, when he stated:

"But decisions of this sort proceed upon the assumption that inclusion will later be possible, and that therefore the finding that the proposed consolidation is in the public interest will not be undermined. This assumption is not always warranted. An inclusion may turn out to be impossible, either because of inability to work out equitable terms, a circumstance upon which inclusion orders have invariably been conditioned, or because upon full consideration the effects of the contemplated inclusion might be regarded as so detrimental that the proposed merger which made necessary the inclusion would be against the public interest" (386 U.S. at pp. 404-405).

* * *

"Where there is a significant possibility, however, that a deferred inclusion upon which a finding of a public interest is premised will be unattainable or attainable only by setting into motion new forces which have not been weighed in evaluating the basic proposal, then the Commission's statutory duty to consider all the relevant factors has not been properly discharged. And I.C.C. action of this sort generally creates dangers far greater than those which normally accrue when an agency or court fails to apply the governing standard to all the relevant facts, since the decision to allow consummation is often irreversible, as it concededly is in this case, or reversible only at enormous expense" (386 U.S. at pp. 405-406).

* * *

Mr. Justice Fortas, in his dissenting opinion in the *Baltimore & Ohio R. Co.* case, disagreed with Justice Brennan's conclusions regarding E-L, D&H and B&M, and stated:

"It is true, as Mr. Justice Brennan argues, that there are problems and difficulties about inclusion of the roads in one of the systems, largely stemming from the poor financial condition of two of the three roads. These difficulties themselves argue for prompt inclusion of the roads in one of the great systems, a result which the three roads' fierce struggle for the last ounce of flesh may paradoxically defeat. But

> judicial pessimism, if it is to lead to administrative nullification, should have a more substantial basis than is present here. There is, in fact, no basis for assuming that the roads will not be included in the N&W; or that the terms and conditions will not be equitable; or that the result will make the Penn-Central merger contrary to the public interest—or that, if any of these happened at the Commission's hands, corrective measures could not be mandated by the courts." (386 U.S. at p. 475.)

In the case of the New Haven, whose disastrous financial condition would have to improve to be labeled as "poor", there *is* a basis for assuming that inclusion will fail, that terms and conditions will not be equitable, that the result will make the Penn-Central merger contrary to the public interest and that corrective measures could not be effectively mandated by the courts.

Judge Friendly's opinion itself recognized that inclusion of the New Haven was uncertain and "is at best some time off". (B&O J.S., B-23.) In fact, it is the District Court's opinion that inclusion may be prevented unless there is such dramatic and unusual action as this Court's reversal of its previous position in the case of *St. Joe Paper Co.* v. *Atlantic Coast Line,* 347 U.S. 298 (1954) or the reversal of the *St. Joe Paper Case* by Congressional action. (B&O J.S., B-24.) The Commission, in its April 6, 1966 report stated:

> "Inclusion of the New Haven's services and the restructuring effort which we call for here and in our ultimate conclusions in the discontinuance case will not be easy. It will demand coordination, cooperation and statesmanship on the part of the many interest involved as well as the railroads. And we do not in any sense overlook the fact that, since New Haven is in bankruptcy, its inclusion will entail reorganization problems under Section 77 of the Bankruptcy Act which must be resolved in conjunction with any inclusion proceeding herein." (327 I.C.C. at p. 525.)

* * *

> "... in the discontinuance report we call for a continuation of public and private effort toward the goal of an ultimate determination which will give the area concerned privately-owned passenger service to be operated without an undue burden on the new Transportation Company and for the economy of the area affected. We have called for both public support and increased effort on the part of railroad management." (327 I.C.C. at p. 525.)

Is it reasonable to conclude that an inclusion which is dependent upon "coordination, cooperation and statesmanship on the part of the many interests involved as well as the railroads", has a substantial degree of certainty?

There is also a basis for assuming that it will not be feasible to fix equitable terms and conditions. Penn-Central itself has argued the difficulty of fixing terms equitable to the New Haven bondholders without placing an undue burden upon the merged Penn-Central system (327 I.C.C. at p. 523). The constitutional questions raised by the possibility that the New Haven is more valuable in liquidation than as an operating railroad, are real and important. The Commission has not yet decided these essential constitutional questions.*

Whatever might be the situation with respect to E-L, D&H and B&M, there is absolutely no question that if the New Haven is not included in the Penn-Central system, the Penn-Central merger would be contrary to the public interest. The Commission, in its April 6, 1966 report, stated:

> "... we find that this merger, without complete inclusion of NH, would not be consistent with the public interest, ..." (327 I.C.C. at p. 524.)

If equitable and constitutional terms and conditions for inclusion of the New Haven are found to be impractical, it

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* District Judge Weinfeld, during the oral argument below, asked Counsel for the Commission to state the Commission's position on this constitutional question. Counsel replied that he could not answer because the Commission still had the question under consideration.

is doubtful that any "corrective measures" could be mandated by the courts. While it may be true that the courts could theoretically mandate corrective measures in the event of the Commission's failure to provide protection for the New Haven, or to provide fair and equitable terms of inclusion, there is little chance that such corrective measures would be effective because the New Haven cannot keep operating during a long period of judicial review and in the face of competition from the merged Penn-Central system. A petition of the Committee to dismiss the reorganization proceedings is even now pending before Judge Anderson in the District Court for the District of Connecticut.

In the *Baltimore & Ohio R.* case, this Court stated:

> "This disposition is also buttressed by the fact that should the immediate consummation of the merger be permitted and at a later date neither the interim conditions nor the inclusion proceedings be disposed of favorably to the continued existence of the merger, the only remedy remaining would be to set it aside and unscramble the consolidation." (386 U.S. at p. 391.)

The same problems will exist if the New Haven inclusion proceedings are disposed of unfavorably to the continued existence of the merger. If the Commission determines that it is not feasible to burden Penn-Central with the constitutional cost of the New Haven, it could grant the discontinuance of New Haven's passenger service, leaving its freight service in operation. Freight service in New England would thus be saved. But the New Haven could not provide such service in the face of a merged Penn-Central system. Such a merger, destroying freight service in New England, would not be in the public interest. Evidence that the New Haven could be successfully reorganized as a freight only railroad is before the Commission in the inclusion proceedings. The Commission has not determined this issue.

II

The District Court erred in failing to enjoin consummation of the Penn-Central merger without simultaneous assumption by the Penn-Central System of the New Haven Railroad Operations.

The Commission has clearly found that the effects of the Penn-Central merger will destroy the New Haven. 327 I.C.C. 475, 522 (April 6, 1966). In addition, the Commission has found that the Penn-Central merger would not be consistent with the public interest without complete inclusion of the New Haven. 327 I.C.C. 475, 524 (April 6, 1966). Although the Commission's April 6, 1966 report does not directly discuss the time for inclusion to take place, its simultaneous report in the passenger train discontinuance case explained:

> "Furthermore, in approving the Penn-Central merger concurrently herewith, the Commission, *as an essential precondition to the consummation of the merger*, has required the inclusion of the New Haven into Penn-Central—that is, inclusion of the New Haven's freight and passenger operations." (327 I.C.C. 151 at p. 173) (emphasis added).

It has become increasingly evident that consummation of the Penn-Central merger without interim protection or assumption of the New Haven operations will cause the eventual destruction of the New Haven and enable Penn-Central to avoid the condition that the New Haven be included.

The court below referred to Judge Anderson's order of July 11, 1967 (Gruss Stay Application, Appendix A) as follows:

> "In his view any substantial postponement of consummation means speedy death for the New Haven; hope lies rather in early consummation subject to a

> commitment that will fairly assure continued operation while the administrative and judicial mills continue their painfully slow grind." (B&O J. S., B 28.)

There is no "commitment" at this time, and in any event, the only "commitment" that would give some assurance that the Commission's intentions would come to pass, is the take over of New Haven operations by Penn-Central simultaneously with the merger. The Committee's petition to dismiss the reorganization proceedings on the grounds that continued loss operations at the expense of the creditors constitutes a taking of the creditors' property without just compensation, in violation of the due process clause of the Constitution, is pending before the Reorganization Court. (Trustees' brief, Appendix B submitted below. Record in No. 778, pp. 1944-2069.) Judge Anderson has long recognized that the constitutional rights of the creditors cannot be disregarded no matter how great the public interest in continued railroad operation. (See excerpts from district court opinions, reprinted in Gruss, Stay Application, Appendix C.) As this Court stated in *Railroad Commission of Texas* v. *Eastern Texas Railroad*, 264 U.S. 79 (1924):

> "And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law." (264 U.S. at p. 85.)

The present problems of the New Haven are not simply the finding of sufficient cash to enable the New Haven to meet its payroll. The further erosion and potential destruction of the security of the mortgage bondholders is not permitted by the Constitution and that situation will not be

changed by the borrowing of cash to meet day to day operations.

The only "inclusion" that could have any relevance in light of the Commission's findings of the destructive impact of the Penn-Central merger upon the New Haven, is an inclusion or take over of New Haven operations simultaneously with the Penn-Central merger.

III

The District Court erred in concluding that there should be immediate consummation of the Penn-Central merger despite its finding that essential conditions for interim support for the New Haven were still pending before the Commission and were incomplete.

No Appendix G conditions have been established for the benefit of the New Haven to preserve the freight traffic status quo pending inclusion. Because a lease form of immediate inclusion of the New Haven operations will solve the New Haven's cash problem and obviate the necessity of providing interim protective conditions or indemnity for diversion of traffic, several creditor representatives, including the Committee, requested the Commission to order Penn-Central to take over the New Haven operations simultaneously with consummation of the merger. The states of New York, Massachusetts, Connecticut and Rhode Island also requested the Commission to order immediate inclusion. Judge Anderson, in his July 11, 1967 order, stated his opinion that the submission of requests for immediate inclusion would be "very much in the interests of the Debtor's estate". (Gruss, Stay Application, Appendix 1)

The Commission, by order dated August 1, 1967, required that consummation of the Penn-Central merger would constitute Penn-Central's irrevocable assent to a

lease on fair and equitable terms prescribed by the Commission, subject to judicial review. On September 1, 1967, ignoring the Commission's suggested operating lease, both Penn-Central and the New Haven Trustees proposed loan arrangements secured by priority lien Trustees' Certificates. After more than six years in reorganization and in the face of continuing losses, a loan such as that proposed by Penn-Central would be of no benefit to the New Haven estate and could neither be constitutionally justified nor tolerated. It seems highly unlikely that, at this stage in the proceeding, authority to borrow further money and issue Trustees' Certificates could or would be granted by the Reorganization Court. Certainly, further borrowing should not be authorized until after the Committee's petition to dismiss the reorganization is decided. *Bankers Trust Co.* v. *Gebhart,* 195 F. 2d 238 (2nd Cir. 1952); *In re Third Ave. Transit Corp.* 198 F. 2d (2d Cir. 1952).

Although Penn-Central has opposed the suggestion, the New Haven Trustees have proposed to the Commission that the loan be conditioned upon a formula that would have the effect of shifting the burden of operating losses to Penn-Central by way of adjustments to the purchase price for the New Haven assets. The proposal, however, fails to provide for the possibility that final sale of the New Haven assets to Penn-Central may not occur. It has the effect of fixing all losses on the bondholders if the Commission or the Reorganization Court does not find it feasible to include the New Haven. It makes a mockery of the presentation of a plan of reorganization to a bondholders' vote, since it has the effect of providing that all losses will fall on the bondholders if they vote against the plan of reorganization.

By its order served September 12, 1967 (B&O Stay Application, Appendix 2), the Commission amended its August 1, 1967 order and imposed an additional condition to the Penn-Central merger by providing that consummation of the merger would constitute an irrevocable assent of Penn-

Central "to lease the New Haven or enter into a loan or other appropriate arrangement with the New Haven for continuation of the New Haven's operations under such just, reasonable and equitable terms as the Commission may require", subject to judicial review. Hearings have been held on this condition and briefs filed, but no determination has been made by the Commission. The opinion below stated:

> "To be sure we are confronted, as we were a year ago, with a condition that is not in all respects complete, although far more nearly so than the Appendix G conditions as they then stood. But with the situation now so serious, there can hardly be doubt that it is better to accept what is good for the New Haven than permit the patient to die while in quest of the best." (B&O J.S., B-29)

But, as long as the question of the mode of interim operation of the New Haven remains undetermined, incomplete and subject to judicial review, there is no "commitment" to assure continued operation and there is nothing that is "good" for the New Haven in consummation of the Penn-Central merger, and much that is bad.

While the New Haven's difficult cash situation has not been caused by the approval of the Penn-Central merger,* the spectre of that merger has prevented the New Haven problems from being solved by action of the various government bodies concerned. Indeed, it has been exacerbated by the Commission's failure to grant the New Haven's passenger discontinuance petition. Since operation of the New Haven is considered to be vital to the New England

* New York Central has made the situation worse by failing to pay to New Haven more than $1,500,000 (as of December 31, 1966) of profits earned from operation of the real estate holdings in the Grand Central Terminal area in New York City. This sum is claimed by the New Haven and an action has been instituted in the New York State Supreme Court.

area, it could logically be expected that if the New Haven were forced to stop operations because of lack of cash, the four concerned states or the Federal Government would exercise rights of eminent domain to assure continued operation. This would place the burden of serving the public interest on the communities served, rather than on the New Haven's creditors.

The states have requested the Commission to order some form of interim take-over of the New Haven because they are unwilling to provide interim cash subsidies to the New Haven sufficient to continue the operation of the railroad until its actual inclusion in Penn-Central. The subsidy requirements will become much greater after Penn-Central has merged and before the New Haven is included because the New Haven will have lost the Penn traffic that is diverted to the Central.

If a plan of reorganization of the New Haven is not concluded, the states will be forced to condemn the New Haven property in the public interest and Penn-Central will avoid the Commission requirement that New Haven operations be assumed by it. It will then be free to negotiate with the states for such portions of the New Haven it desires or requires, at arms length and free of the Commission's requirement as to fairness and equity. It will have accomplished its merger and avoided the essential conditions imposed by the Commission.

IV

The District Court erred in concluding that the Penn-Central merger may lawfully be consummated without the Commission having provided conditions to protect the freight traffic of the New Haven from diversion to the Penn-Central System until such time as the New Haven was included in the Penn-Central System or ceased to operate as a railroad.

As noted by the court below, the issue of financial indemnity conditions is pending before the Commission in the New Haven inclusion proceedings, but there are no Appendix G conditions for protection of the New Haven in the event that inclusion is delayed or does not occur (B&O J.S., B-29, 30). The District Court's conclusion that the Interstate Commerce Act does not require protection against diversion of traffic because the New Haven may fail even without the merger, is simply incorrect. It is established that the merger will destroy the New Haven and that is not in the public interest. Section 5(2) of the Interstate Commerce Act permits approval of a merger only if it is consistent with the public interest and Section 5(2)(c) specifically directs the Commission to give weight to the effect of the merger upon other railroads in the territory. Losses from merger diversion will occur while the New Haven continues to be independently operated. The New Haven is entitled to protection against those losses, especially since those losses will hasten and insure its demise. *Baltimore & Ohio R. Co.* v. *United States, supra;* 49 U.S.C. § 5(2). See *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944); *Chicago Junction* Case, 264 U.S. 258 (1924).

If Penn and Central are merged before the New Haven is included or protected against diversion, Penn-Central will be free to litigate interminably the question of whether the terms of inclusion are "equitable". At the same time

it will have an interest in and the power to divert the New Haven's traffic drastically. The Estate will not be able to withstand the losses and the governments will have no interest in continuing their support. Penn-Central and the states will be able to force the New Haven bondholders to capitulate to Penn-Central or to seek termination of the reorganization proceedings, without recovery of any part of the losses resulting from diversion.

If inclusion fails or the reorganization proceedings are dismissed, the governmental authorities which represent the public interest will be required to continue railroad operations. The Commission will have, by its failure to provide the New Haven with protection against the admittedly destructive competition from Penn-Central, imposed the diversion losses upon the governments.

At this indefinite stage of the proceedings, only two possibilities exist: inclusion or the dismissal of the reorganization. In the event of inclusion, the Commission has pending before it the determination of provisions for indemnity for diversion losses and for the sharing of losses not caused by diversion in the period between merger and inclusion. In the event that the reorganization proceedings are dismissed and there is condemnation of all or part of the New Haven and operation by governmental authority, the Commission has failed to provide protection from the damages that are certain to occur between merger and condemnation and thereafter. If the reorganization proceedings are dismissed and condemnation does not take place, the Commission has failed to provide for protection between the time of merger and cessation of operations. Proof has been presented in the New Haven Inclusion proceedings that the New Haven could be profitably operated on a freight-only basis, and the Commission has strongly indicated that its denial of permission for the New Haven to discontinue its deficit passenger operations was based upon an expectation of inclusion. See 327 I.C.C. 151 (Apr. 5, 1966).

The Commission's requirement that Penn-Central not object to inclusion of the New Haven and its reservation of jurisdiction to provide indemnity for diversion of traffic in the pending inclusion proceedings does not satisfy the statutory requirements of Section 5(2) of the Interstate Commerce Act. *Baltimore & Ohio R. Co.* v. *United States, supra.* The absence of protective conditions against diversion following the merger is a fatal omission. The Commission refuses to recognize that inclusion of the New Haven in the Penn-Central system may never take place, even though, at this stage in the proceedings, it has not determined whether fair and equitable terms of inclusion consistent with the public interest can be formulated.

Conclusion

This Court has jurisdiction of this appeal. The questions presented are substantial.

The order of the District Court should be reversed and remanded with instructions to restrain consummation of the Penn-Central merger unless and until the risk of New Haven's operations are assumed by Penn-Central between the date of consummation of the merger and the completion of the New Haven's reorganization proceedings.

Respectfully submitted,

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MIGDAL, LOW, TENNEY & GLASS
Of Counsel

November 17, 1967

APPENDIX A

Order

SERVICE DATE
October 6, 1967

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of October, 1967.

Finance Docket No. 21989

PENNSYLVANIA RAILROAD COMPANY—MERGER—
NEW YORK CENTRAL RAILROAD COMPANY

Finance Docket No. 21990

PENNSYLVANIA RAILROAD COMPANY STOCK ISSUANCE

Finance Docket No. 24361

PENNSYLVANIA RAILROAD COMPANY SECURITIES
AND ASSUMPTION OF OBLIGATIONS

Finance Docket No. 21669

NEW YORK, NEW HAVEN & HARTFORD RAILROAD
COMPANY REORGANIZATION

On September 1, 1967, the Trustees of the property of the New York, New Haven and Hartford Railroad Company filed Supplementary Statement No. 2 and Amendment No. 2 to their plan of reorganization of that railroad, and they requested an appropriate order of notice of the filing, fixing a date for hearing thereon.

It appearing, That the matter is one which the Commission is authorized to refer to an examiner;

And it further appearing, That the record warrants the conclusion and we so find that the due and timely execution

of the Commission's functions imperatively and unavoidably requires the omission of an examiner's report and recommended order:

It is ordered, That the matter be, and it is hereby referred to Examiner Arthur S. Present, for hearing on November 29, 1967, at 14th Floor, GSA Building, 30 Church Street, New York, N. Y., at 9:30 o'clock a.m. United States Standard Time;

It is further ordered, That the Trustees of the property of the New York, New Haven and Hartford Railroad Company shall make available at the hearing a competent witness or witnesses for examination on all material and relevant facts recited in their Supplementary Statement No. 2 and Amendment No. 2 to their plan of reorganization, which pleading is part of the record subject to the right of full cross-examination by protestants and interveners in opposition;

It is further ordered, That on or before November 3, 1967, the New Haven Trustees shall distribute by first-class U. S. mail a copy of each exhibit which they propose to offer in evidence, including the statement of each witness to appear at the hearing, to the examiner and to those parties who are on the service list for these proceedings initially consolidated for hearing by order of November 9, 1966;

It is further ordered, That on or before November 24, 1967, every party desiring to rebut said exhibits shall distribute by first-class U. S. mail a copy of each rebuttal exhibit which it proposes to offer in evidence, including the rebuttal statement of each witness to appear at the hearing, to the examiner and to those parties on the service list as heretofore indicated;

It is further ordered, That each party shall assign numbers to its exhibits prefixed by an appropriate designation identifying the party;

It is further ordered, That all parties presenting evidence at the hearing shall afford to other interested parties reasonable access to all working papers and underlying data supporting their respective exhibits, under conditions mutually agreeable or as may be directed by the examiner;

It is further ordered, That the hearing shall be governed by the procedures set forth in the report and order on prehearing conference herein, dated December 21, 1966;

It is further ordered, That any party desiring to be notified of any change in the time or place of the hearing (at his own expense if telegraphic notice becomes necessary) shall inform the Secretary, Interstate Commerce Commission, Washington, D. C. 20423, by written notice at least 30 days prior to the date of the hearing;

And it is further ordered, That a report and recommended order by the examiner to whom these proceedings are assigned for hearing be omitted as part of the decision-making process in these proceedings, and the record herein shall be considered as certified to the Commission for initial decision when received by the Secretary of the Commission for filing in the docket.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX B

Statutes Involved

Administrative Procedure Act

Section 10(a), 5 U.S.C. § 702.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 10(c), 5 U.S.C. § 704.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Section 10(e), 5 U.S.C. § 706.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Judicial Code

28 U.S.C. § 1253.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Appendix B

28 U.S.C. § 1336.

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

28 U.S.C. § 2101(b).

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

28 U.S.C. § 2284.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any de-

partment or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants. Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State

statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

28 U.S.C. § 2321.

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 U.S.C. § 2322.

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 U.S.C. § 2323.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Com-

mission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 U.S.C. § 2324.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 U.S.C. § 2325.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Appendix B

Interstate Commerce Act

Section 5(2), 49 U.S.C. § 5(2).

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in sub-division (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carrier involved in the proposed transaction is situated, and also such carriers and the ap-

plicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed

transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the

period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(9), 49 U.S.C. § 5(9).

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

Bankruptcy Act

§ 77(b)(d)(e)(f)(g), 11 U.S.C. § 205(b)(d)(e)(f)(g)

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on un-

funded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not pre-

clude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accord-

ance with principles obtaining in equity proceedings. The provisions of section 60 of this Act shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party, to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the re-

quirements of subsections (b) (and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does

not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The

plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof,

or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affceted by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the revelant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e). *Provided further,*

That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operations shall be determined on a

basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any state or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and convey-

ance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. The provisions of title I and of section 5 of the Securities Act of 1933, as amended, shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of the said Securities Act, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subdivision (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) hereof. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable

with respect to any action or matter which is within the provisions of subsection (p) hereof.

(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order.